

GBAPACES

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

15 CR 369 (GHW)

5 EDWIN ACETY,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 November 10, 2016  
10:13 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the  
Southern District of New York

17 MICHAEL FERRARA

Assistant United States Attorney

18 SABRINA SHROFF

19 Attorney for Defendant

20 ALSO PRESENT: AGENT MAUREEN TYLER, DCIS  
21 JOHN GALVIN, Postal Inspector

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1 (In open court)

2 (Case called)

3 MR. FERRARA: Good morning, your Honor. Michael  
4 Ferrara from the government, and I am joined by two special  
5 agents from Defense Criminal Investigative Services, Maureen  
6 Tyler, to my direct left, and towards the end of the table,  
7 from Postal Inspection Service, John Galvin.

8 THE COURT: Thank you very much. Good morning.

9 MS. SHROFF: Good morning. For Mr. Acety, Federal  
10 Defenders of New York, Sabrina Shroff. Mr. Acety is present  
11 and to my left.

12 THE COURT: Good morning. We are here to conduct a  
13 sentencing hearing for Mr. Acety. I've received and reviewed  
14 the following materials in connection with this sentencing.  
15 First, a presentence report which is dated October 24, 2016;  
16 second, the defendant's sentencing memorandum dated  
17 November 3rd, 2016, together with its exhibits; and third, the  
18 government's sentencing memorandum, which is dated  
19 November 3rd, 2016. Have each of the parties received all of  
20 those materials?

21 MR. FERRARA: The government has, your Honor.

22 MS. SHROFF: Yes, your Honor.

23 THE COURT: Thank you. Have the two sentencing  
24 memoranda been filed with the clerk of court?

25 MR. FERRARA: I did not do it personally, but I

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1 understand it has been, yes.

2 THE COURT: Thank you.

3 MS. SHROFF: No, your Honor. Mine was filed under  
4 seal.

5 THE COURT: What's the basis for it to be filed under  
6 seal?

7 MS. SHROFF: Your Honor, because Mr. Acety met with  
8 the government and provided substantial information to the  
9 United States, we did not think that it should be filed on ECF.

10 THE COURT: Thank you. I won't accept a complete seal  
11 of the entire submission. If you wish to review it and  
12 identify specific elements of it that you believe should be  
13 placed under seal, I would entertain that submission.

14 MS. SHROFF: That's fine, your Honor. What I'll do is  
15 I'll redact the paragraph on Page 4, and then I will ECF file  
16 it.

17 THE COURT: Thank you very much. I see it. Thank  
18 you. I'd appreciate that. Thank you very much. I look  
19 forward to seeing that. Will you be able to do that today,  
20 Ms. Shroff?

21 MS. SHROFF: I'm sorry, I didn't hear you.

22 THE COURT: Will you be able to do that today?

23 MS. SHROFF: Sure.

24 THE COURT: Good. Are there any other submissions in  
25 connection with the sentencing?

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1 MR. FERRARA: No, your Honor.

2 MS. SHROFF: Not from us, your Honor.

3 THE COURT: Thank you. Ms. Shroff, have you read the  
4 presentence report?

5 MS. SHROFF: I have, your Honor.

6 THE COURT: Have you discussed it with your client?

7 MS. SHROFF: I have.

8 THE COURT: Mr. Acety, can I turn to you, please.

9 Have you read the presentence report?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you discussed it with your counsel?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have you had the opportunity to review  
14 with your counsel any errors in the presentence report, or any  
15 other issues that should be addressed by the Court?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Thank you. Let me turn to the United  
18 States. Counsel, have you read the presentence report?

19 MR. FERRARA: Yes, your Honor.

20 THE COURT: Do you have any objections related to the  
21 factual accuracy of the presentence report?

22 MR. FERRARA: No.

23 THE COURT: Thank you. Ms. Shroff, do you have any  
24 objections related to the factual accuracy of the presentence  
25 report?

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1 MS. SHROFF: No, your Honor.

2 THE COURT: Thank you. Given that there are no  
3 objections to the factual recitations in the presentence  
4 report, the Court adopts the factual recitations in the  
5 presentence report. The presentence report will be made a part  
6 of the record in this matter and will be placed under seal. If  
7 an appeal is taken, counsel on appeal may have access to the  
8 sealed report without further application to the court.

9 The district courts are no longer required to follow  
10 the sentencing guidelines. We are still required to consider  
11 the applicable guidelines in imposing sentence, and to do so it  
12 is necessary that we accurately calculate the sentencing range.

13 In this case, the defendant pleaded guilty, pursuant  
14 to a plea agreement, to one count of an information charging  
15 that the defendant exported and attempted to export controlled  
16 defense articles without a license to Russia, in violation of  
17 22 U.S.C. section 2778(b)(2) and (c).

18 There's a plea agreement in this case, I understand,  
19 in which the parties stipulated to a particular calculation of  
20 the sentencing guidelines. Counsel, can you please confirm  
21 that I'm correct that the sentencing guidelines calculation in  
22 the presentence report is substantively consistent with that  
23 agreement?

24 MR. FERRARA: That's my understanding, your Honor.

25 MS. SHROFF: Yes, your Honor.

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1           THE COURT: Thank you. Let me turn to you,  
2 Mr. Ferrara. Does the government agree that a two-level  
3 adjustment is appropriate here under section 3(e)(1.1)(A)?

4           MR. FERRARA: Yes.

5           THE COURT: Is the government moving for an additional  
6 one-level adjustment under section 3(e)(1.1)(D)?

7           MR. FERRARA: Yes, your Honor.

8           THE COURT: Thank you. I calculate the sentencing  
9 guidelines in a manner consistent with the presentence report.  
10 The applicable sentencing guidelines manual is the  
11 November 1st, 2015, sentencing guidelines manual, as  
12 supplemented by the August 1, 2016, supplement.

13           Pursuant to section 2(m)(5.2), the basic level of the  
14 offense is 26 because the defendant, I find, fell between a  
15 minor participant and a minimal participant. His offense level  
16 is decreased by three pursuant to section 3(b)(1.2). Because  
17 the defendant has demonstrated acceptance of responsibility for  
18 his offense, through his plea allocution, I apply a two-level  
19 reduction pursuant to section 3(e)(1.1)(A). Upon motion by the  
20 government, an additional one-level adjustment is warranted  
21 under section 3(e)(1.1)(D).

22           As a result, the applicable guidelines offense level  
23 is 20. The defendant has no criminal history points.  
24 Therefore, his criminal history category is I.

25           Counsel, is it correct that in the plea agreement both

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1 parties agreed not to seek a departure under the guidelines?

2 MR. FERRARA: Yes, your Honor.

3 MS. SHROFF: Yes, your Honor.

4 THE COURT: Thank you. Nonetheless, I've considered  
5 whether there is an appropriate basis for departure from the  
6 advisory range within the guidelines system, and while I  
7 recognize that I have the authority to depart, I do not find  
8 any grounds warranting a departure under the guidelines.

9 In sum, I find that the offense level is 20 and the  
10 criminal history category is I. Therefore, the guidelines  
11 range in this matter is 33 to 41 months' imprisonment. Does  
12 either party have any objections to the sentencing guidelines  
13 calculation?

14 MR. FERRARA: No.

15 MS. SHROFF: No, your Honor.

16 THE COURT: Thank you. Ms. Shroff, do you wish to be  
17 heard with respect to sentencing?

18 MS. SHROFF: Your Honor, I ask the Court to follow the  
19 recommendation of the department of probation and sentence  
20 Mr. Acety to time served.

21 THE COURT: Thank you. Mr. Acety, do you wish to make  
22 a statement?

23 THE DEFENDANT: No.

24 THE COURT: Thank you. Does the United States wish to  
25 be heard with respect to sentencing?

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1           MR. FERRARA: Unless the Court has questions, we will  
2           rely on the written submission, your Honor.

3           THE COURT: Thank you. Is there any reason why  
4           sentence should not be imposed at this time?

5           MR. FERRARA: I know of none, your Honor.

6           MS. SHROFF: No, your Honor.

7           THE COURT: All right. Now I'll describe the sentence  
8           that I intend to impose, but counsel will have a final  
9           opportunity to make legal objections before the sentence is  
10          finally imposed. As I've stated, the guidelines range  
11          applicable to this case is 33 to 41 months' imprisonment. I've  
12          considered the guidelines range.

13          Under the Supreme Court's decision in Booker and its  
14          progeny, the guidelines range is only one factor that I must  
15          consider in deciding the appropriate sentence. I'm also  
16          required to consider the other factors set forth in 18 U.S.C.  
17          section 3553(a). These include, first, the nature and  
18          circumstances of the offense, and the history and  
19          characteristics of the defendant; second, the need for the  
20          sentence imposed to:

21                 A, reflect the seriousness of the offense, to promote  
22          respect for the law, and to provide just punishment for the  
23          offense;

24                 B, to afford adequate deterrence to criminal conduct;

25                 C, to protect the public from further crimes of the



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1 defendant;

2 And, D, to provide the defendant with needed education  
3 or vocational training, medical care or other correctional  
4 treatment in the most effective manner.

5 Third, the kinds of sentences available.

6 Fourth, the guidelines range.

7 Fifth, any pertinent policy statement.

8 Sixth, the need to avoid unwarranted sentence  
9 disparities among defendants with similar records who have been  
10 found guilty of similar conduct.

11 And, seventh, the need to provide restitution to any  
12 victims of the offense.

13 Ultimately, I'm required to impose a sentence  
14 sufficient but no greater than necessary to comply with the  
15 purposes of sentencing that I mentioned a moment ago as set  
16 forth in section 3553(a).

17 I've given substantial thought and attention to the  
18 appropriate sentence in this case, considering all of the  
19 section 3553(a) factors and the purposes of sentencing as  
20 reflected in the statute. Based on a review of all of the  
21 factors, which I will discuss in more detail in a moment, I do  
22 intend to impose a non-guidelines sentence of one year  
23 probation, subject to the mandatory and special conditions  
24 described in the presentence report, which I will detail with  
25 more specificity later.

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1 I do not expect an order of restitution, but I do  
2 expect to impose a forfeiture order. I also expect to impose a  
3 fine. I will impose the mandatory fee of \$100. I'll discuss  
4 those issues again in more depth after I have reviewed my  
5 reasoning.

6 Mr. Acety, you pleaded guilty to the illegal  
7 exportation of defense articles from the U.S. munitions list to  
8 Russia without a license. This is a serious offense. I  
9 understand from your submission that you suggest that this  
10 conduct was done at the request of your friend and  
11 co-defendant, Mr. Bryukhov, and that I've already found that  
12 your role in the offense was minor.

13 Still, you acquired night vision equipment that may  
14 not be exported to Russia without a license, provided it to  
15 Mr. Bryukhov knowingly, knowing that those materials would be  
16 exported to Russia. This is a felony offense. It is a serious  
17 offense and one that I take extremely seriously.

18 My sentence here does not minimize the nature of the  
19 offense, but it takes into account the role that you had in it  
20 and, as I will discuss, recognizes the other mitigating factors  
21 that I found in my review of the 3553(a) factors.

22 Mr. Acety is a Brooklyn native, born there in 1975.  
23 You dropped out of school in the 12th grade to work in a horse  
24 stable in Prospect Park, I understand. It appears that you've  
25 had a stable work history since then working in a variety of

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1 jobs, as a technician's assistant at an animal hospital, as a  
2 chimney sweep, a boiler mechanic, and most recently and  
3 currently, a position as a live-in superintendent for rental  
4 properties in Brooklyn.

5 Your job, Mr. Acety, the reduced rent that you have in  
6 that capacity, seem to provide you with a reasonable amount of  
7 positive monthly cash flow. You are blessed with good health,  
8 a caring family. Your mother and your siblings all wrote to me  
9 in connection with this sentencing. You have no criminal  
10 history other than this offense, and Ms. Shroff represents to  
11 me the single blemish resulted from your undue trust in  
12 Mr. Bryukhov, the co-defendant.

13 I've read all of the letters from your family members  
14 and friends. They describe you as a dedicated, hard working  
15 and honest person, but now a felon, and a person who's made a  
16 very serious mistake that, as you know, will follow with you  
17 for your life.

18 In sum, however, Mr. Acety, while guilty of a serious  
19 offense, is a first-time felony offender. He has a family. He  
20 has a decent job. He's adjusted well, as I understand it, to  
21 pretrial supervision, and I read Ms. Shroff's description of  
22 the impact of this conviction on your life already, and I take  
23 all of those factors into consideration in reaching my decision  
24 that a term of incarceration is not appropriate for you.

25 I'm required to consider the deterrent effect on you

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1 personally, Mr. Acety, and to deter others from committing this  
2 crime. With respect to personal deterrence, the record before  
3 me does not suggest that Mr. Acety is likely to participate in  
4 this type of criminal activity in the future. I understand  
5 that he was attempting to help Mr. Bryukhov, who was  
6 incarcerated, and then would be subject to a term of home  
7 incarceration. And that Mr. Acety, I hope, now understands  
8 that the assistance that he provided to his friend was illegal,  
9 that as a convicted felon, Mr. Acety will have a strong  
10 disincentive to undertake similar conduct in the future.

11 I've considered the need to provide Mr. Acety with the  
12 opportunity to obtain educational or vocational training,  
13 medical care or other correctional treatment in the most  
14 effective manner.

15 In this case, I believe that a term of incarceration  
16 will not advance Mr. Acety. He is currently employed in a  
17 stable profession in which he has found some success. I  
18 believe, as a result, that he will be better served by a  
19 non-incarceratory sentence. I've considered the kinds of  
20 sentences available, given the nature of the offense. I  
21 believe that a sentence with a term of imprisonment beyond time  
22 served is not appropriate.

23 Probation is permitted under the statute, and given  
24 Mr. Acety's personal circumstances and his minor role in the  
25 offense, I believe that it is the appropriate sanction in this

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1 case. I've given serious consideration to the guidelines and  
2 the policy statements in this case. However, I believe that a  
3 non-guidelines sentence is appropriate, again, in light of the  
4 defendant's minor role in the offense, the nature of the  
5 offense, and otherwise, his clear record, and my hope for his  
6 future prospects as he continues in his profession with the  
7 support of his family.

8 I've considered the need to avoid unwarranted sentence  
9 disparities while I'm imposing a sentence that is lower than  
10 the guidelines range and that may, therefore, be lower than  
11 that for similarly situated defendants nationwide. I believe  
12 that it's necessary or appropriate in light of the nature and  
13 characteristics of this defendant. The sentence is also in  
14 proportion to the sentence that I imposed on his co-defendant,  
15 who was substantially more culpable than Mr. Acety.

16 With that, Mr. Acety, please rise for the imposition  
17 of sentence. Mr. Acety, it is the judgment of this court that  
18 you be sentenced to one year of probation. The mandatory  
19 conditions of probation shall apply. They are:

20 The defendant shall not commit another federal, state  
21 or local crime. The defendant shall not illegally possess a  
22 controlled substance. The defendant shall not possess a  
23 firearm or destructive device. The defendant shall cooperate  
24 in the collection of DNA as directed by the probation officer.  
25 The defendant shall refrain from any unlawful use of a

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1 controlled substance. The defendant shall submit to one drug  
2 test within 15 days of placement on probation and at least two  
3 unscheduled drug tests thereafter.

4 The standard conditions of probation one through 13  
5 shall apply. In addition, the following special conditions  
6 shall apply:

7 The defendant shall submit his person, residence,  
8 place of business, vehicle, and any property or electronic  
9 devices under his control to a search on the basis that the  
10 probation officer has reasonable belief that contraband or  
11 evidence of a violation of the conditions of the defendant's  
12 probation may be found. The search must be conducted at a  
13 reasonable time and in a reasonable manner. Failure to submit  
14 to a search may be grounds for revocation. The defendant shall  
15 inform any other residents that the premises may be subject to  
16 a search pursuant to this condition.

17 The defendant shall provide the probation officer with  
18 access to any requested financial information. The defendant  
19 shall be supervised in his district of residence. The  
20 defendant is to report to the nearest probation office within  
21 72 hours. I believe that you are capable of paying a fine for  
22 the reasons set forth in the PSR. You have positive cash flow.  
23 I believe that a fine is appropriate here, in light of your  
24 conduct. As a result, I'm going to impose a fine on defendant  
25 of \$4,000.

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1 MS. SHROFF: Your Honor?

2 THE COURT: Yes.

3 MS. SHROFF: May I most respectfully ask the Court to  
4 reconsider imposing a fine. The government is seeking  
5 forfeiture from Mr. Acety. He may have some cash flow, but  
6 from having represented him for this long, it's a daily  
7 struggle. The only reason he's able to even have a cash flow  
8 is because he's a superintendent. He's been working to leave  
9 New York City for almost a year now. Most respectfully, your  
10 Honor, I ask that the Court please reconsider the imposition of  
11 a fine.

12 THE COURT: Thank you. I see monthly cash flow of  
13 \$1,338; that he pays \$300 a month for parking, \$600 a month for  
14 car repairs, \$500 a month for veterinarian expenses. That is  
15 \$1,400 for parking, car and veterinary expenses.

16 MS. SHROFF: He has two elderly dogs, your Honor, and  
17 he uses the car to help with his mother's many medical issues  
18 that we have detailed in our submission and which is reflected  
19 in the PSR.

20 THE COURT: Thank you. I've considered that you can  
21 object to the sentence, if you wish, when I get to the end.  
22 I'm ordering that the defendant pay a fine of \$4,000. The  
23 defendant must pay to the United States a total special  
24 assessment of \$100, which shall be due immediately. The  
25 defendant must forfeit all property, real and personal,

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1 involved in the offense or traceable to the offense, including  
2 but not limited to \$6,000 in U.S. currency. Is there a  
3 proposed order of forfeiture?

4 MR. FERRARA: I apologize, your Honor. It occurred to  
5 me when your Honor was listing the things that the Court had  
6 received, that you had not mentioned a preliminary order of  
7 forfeiture. We will get that to the Court promptly. They  
8 don't trust us to draft those. The asset forfeiture unit does  
9 that, but I believe, having done this many times, that if your  
10 Honor puts \$6,000 in the judgment as forfeiture today, we would  
11 get your Honor the preliminary order of forfeiture next week,  
12 that would be sufficient, legally sufficient. The judgment  
13 could issue today, if your Honor wanted to.

14 THE COURT: Thank you. Ms. Shroff, what's your  
15 position?

16 MS. SHROFF: I informed Mr. Ferrara that we have no  
17 objection to the government taking some time. We didn't object  
18 to the forfeiture, and Mr. Acety is going to make his best  
19 efforts to repay.

20 THE COURT: Thank you. So I will impose that  
21 judgment. Again, the defendant must forfeit all property, real  
22 and personal, involved in the offense or traceable to the  
23 offense, including but not limited to, \$6,000 in U.S. currency,  
24 and I'll include that order of forfeiture in the judgment.

25 Mr. Ferrara, I understand that the United States is



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1 not seeking restitution in this case; is that correct?

2 MR. FERRARA: It is, your Honor.

3 THE COURT: Thank you. Does either counsel know of  
4 any legal reason why this sentence shall not be imposed as  
5 stated?

6 MR. FERRARA: No, your Honor.

7 MS. SHROFF: No, your Honor.

8 THE COURT: Thank you. The sentence, as stated, is  
9 imposed. I find that sentence to be sufficient but not greater  
10 than necessary to comply with the purposes of sentencing set  
11 forth in 18 U.S.C. section 3553(a)(2).

12 Mr. Ferrara, are there open counts that need to be  
13 dismissed?

14 MR. FERRARA: Yes, and the government moves to do so  
15 now.

16 THE COURT: Ms. Shroff?

17 MS. SHROFF: Yes, that's fine, your Honor, but may I  
18 ask that the Court at least inform probation that no interest  
19 should be imposed while he pays the fine?

20 THE COURT: Thank you. Let me come to that  
21 momentarily. Just give me one minute. I'm ordering dismissal  
22 of the open counts.

23 Now, Mr. Acety, you have the right to appeal your  
24 conviction and sentence, except to whatever extent you may have  
25 validly waived that right as part of your plea agreement. The

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1 notice of appeal must be filed within 14 days of the judgment  
2 of conviction. If you're not able to pay the costs of an  
3 appeal, you may apply for leave to appeal in forma pauperis.  
4 If you request, the clerk of court will prepare and file a  
5 notice of appeal on your behalf.

6 Ms. Shroff, you wanted to raise a point regarding  
7 payment terms for the forfeiture and fine?

8 MS. SHROFF: Your Honor, if the Court still feels that  
9 a fine is appropriate, I've made my arguments. I just ask that  
10 you have the department of probation not impose any interest  
11 while he's paying the fine; so that, you know, while he's  
12 making monthly payments, there is no interest imposed on the  
13 total amount and the same holds true for the forfeiture.

14 THE COURT: Thank you. I'll consider that. Are there  
15 any other applications?

16 MS. SHROFF: No, your Honor.

17 MR. FERRARA: Not from the government, your Honor.

18 THE COURT: Thank you very much. I take it that these  
19 are your friends and family members in the back, Mr. Acety?

20 THE DEFENDANT: Yes.

21 THE COURT: Let me thank you for being here. I know  
22 that you arrived late. I can tell you that your letters in  
23 support for Mr. Acety were important for me in considering what  
24 the appropriate sentence was for him. As you may have heard,  
25 I've not imposed a sentence of incarceration on him in large

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1 part hoping that he will, with your support, be able to avoid  
2 this kind of conduct in the future and live a successful life.  
3 So, please, continue to support him.

4 Mr. Acety, I wish you luck. Please don't show up in  
5 my courtroom again.

6 THE DEFENDANT: I won't.

7 THE COURT: Thank you. This proceeding is adjourned.

8 (Pause)

9 MS. SHROFF: Your Honor, I'm sorry.

10 THE COURT: Yes, Ms. Shroff?

11 MS. SHROFF: I apologize. Was the Court going to rule  
12 on the interest?

13 THE COURT: I'm going to take your consideration under  
14 advisement. I'll determine it when I look at the judgment  
15 form. My expectation is that I will not impose interest on the  
16 defendant.

17 MS. SHROFF: Okay. Thank you, your Honor, and I just  
18 wanted to make sure that the Court knows that Mr. Ferrara would  
19 not object to our request.

20 THE COURT: Thank you. Is that correct, Mr. Ferrara?

21 MR. FERRARA: It is, your Honor.

22 THE COURT: Thank you. Do I get to hit my gavel  
23 again?

24 MS. SHROFF: Sure.

25 THE COURT: Thank you.

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1 MR. FERRARA: Have a good day, your Honor.  
2 (Adjourned)

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